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NOTE

RAPANOS V. UNITED STATES: THE SUPREME COURT'S FAILED ATTEMPT TO INTERPRET WETLAND REGULATION UNDER THE CLEAN WATER ACT

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In 1978, the Love Canal neighborhood of Niagara Falls, New York, became "one of the most appalling environmental tragedies in American history."[1] This residential community, once a dumpsite for municipal and residential wastes, became the ultimate symbol of modern environmental contamination.[2] Despite its origin as the vision of a dream community, Love Canal became a neighborhood plagued by toxic chemicals, dying vegetation, and birth defects.[3] The story of Love Canal serves as a haunting reminder that environmental contamination and destruction of the Earth's natural resources is one of the most important issues in the modern world. Humans rely upon the environment in countless ways. Given this relationship and the global impact that environmental problems pose, preservation of the environment and its resources is a vital task that nations face throughout the world.

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1. Eckardt C. Beck, *The Love Canal Tragedy*, 5 EPA J. 17, 17 (1979), *available at* http://www.epa.gov/history/topics/lovecanal/01.htm.

2. *See id.* In the late nineteenth century, William T. Love envisioned Love Canal as a dream community which was to be an innovation in residential development. *Id.* Love planned to dig a canal between the upper and lower Niagara Rivers in order to generate electricity. *Id.* This electricity would be used to supply the power industry and the homes of the Love Canal community. *Id.* Despite Love's ambitious plans, however, construction was never completed and the site was transformed into a dumpsite for municipal and chemical wastes. *Id.*

3. *See id.* As a result of the severe contamination present in Love Canal, the federal government declared the community an environmental disaster area and relocated the families living there. *Id.* at 18.

In response to the growing concern over environmental contamination and public demand for preservation of the nation's natural resources, the executive and legislative branches of the United States created the Environmental Protection Agency (EPA) in July of 1970.[4] As the first coordinated government agency dedicated to the preservation and protection of human health and the environment, the EPA is responsible for a variety of tasks aimed at achieving its mission.[5] To assist the EPA in its efforts to address the nation's environmental concerns, Congress enacted the Federal Water Pollution Control Act Amendments of 1972 (FWPCA).[6] The objective of the FWPCA was "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[7] Although the FWPCA, later known as the Clean Water Act (CWA), allowed the federal government to exert greater control over environmental regulation, the CWA has caused confusion over the scope of the federal government's powers to regulate water.[8]

Among the many provisions of the CWA, one of the most controversial and confusing provisions contains the definition of "navigable waters,"

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4. *See* Reorganization Plan No. 3 of 1970, 3 C.F.R. 199 (1971-1975), *reprinted in* 5 U.S.C. app. at 609 (1970), *and in* 84 Stat. 2086 (1970). Through this reorganization, President Nixon transferred to the EPA functions previously performed by the Department of the Interior and the Department of Health, Education, and Welfare. *Id.* at 199-201, *reprinted in* 5 U.S.C. app. at 609-11 (1970), *and in* 84 Stat. 2086, 2087-88 (1970). In his message accompanying the transmittal to Congress, President Nixon noted that concern with the environment had grown and that it had become clear that the government needed "to know more about the total environment—land, water and air." *Id.*, *reprinted in* 5 U.S.C. app. at 611 (1970). However, the federal government was not properly coordinated to address the nation's environmental concerns because "[t]he Government's environmentally-related activities [had] grown up piecemeal over the years." *Id.* Therefore, the time had come to pull "together into one agency a variety of research, monitoring, standard-setting and enforcement activities." *Id.*

5. *See id.*, *reprinted in* 5 U.S.C. app. at 611 (1970). The primary roles and functions of the EPA include developing and enforcing environmental regulations, conducting research on the environmental effects of pollution and the possible means of controlling it, providing financial assistance to various entities in order to aid in the implementation of environmental protection programs, and assisting in the development of new environmental policies. *Id.*, *reprinted in* 5 U.S.C. app. at 612 (1970).

6. Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 (codified as amended at 33 U.S.C.A. §§ 1251-1387 (West 2001 & Supp. 2006).

7. *Id.* sec. 2, § 101(a) (codified as amended at 33 U.S.C. § 1251(a) (2000)).

8. *See* Gregory T. Broderick, *From Migratory Birds to Migratory Molecules: The Continuing Battle Over the Scope of Federal Jurisdiction Under the Clean Water Act*, 30 COLUM. J. ENVTL. L. 473, 522 (2005). All three branches of the federal government have attempted to address the issue of the CWA's jurisdictional reach, but all three have failed to develop a reasonable solution. *See id.* Therefore, because "the lower courts are at an irreconcilable stand-off over the scope of federal jurisdiction" granted by the CWA, and "[b]ecause neither the Executive nor Congress seems to have the political will to resolve the confusion . . . , property owners are left in the lurch, with little or no clue whether they will face severe penalties for otherwise normal activity." *Id.*

which are "the waters of the United States, including the territorial seas."[9] The meaning of "navigable waters" is crucial because it delineates the scope of the federal government's authority to regulate water under the CWA.[10] Courts and commentators have disagreed about what meaning Congress intended to give this key phrase,[11] which illustrates the ambiguous nature of the EPA's regulatory jurisdiction under the CWA.

Early in the nation's history, the federal government's jurisdiction over water depended exclusively upon the actual or potential navigability of a particular body of water.[12] This narrow view rested solely upon the Com-

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9. 33 U.S.C. § 1362(7) (2000).

10. *See* Rapanos v. United States, 126 S. Ct. 2208, 2215 (2006) (plurality opinion) (noting that one of the central provisions of the CWA relies upon the term "navigable waters" to define a prohibited act). The CWA provision described in *Rapanos* states that "the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. § 1311(a) (2000). The "discharge of a pollutant" is defined as "any addition of any pollutant to navigable waters from any point source." *Id.* § 1362(12). Reporting on its consideration of the FWPCA, the Senate Committee on Public Works recommended that as a national policy, "[t]he discharge of pollutants into the navigable waters be eliminated by 1985." S. REP. NO. 92-414 (1971), *as reprinted in* 1972 U.S.C.C.A.N. 3668, 3674.

11. *See* Bradford C. Mank, *The Murky Future of the Clean Water Act After* SWANCC: *Using a Hydrological Connection Approach to Saving the Clean Water Act*, 30 ECOLOGY L.Q. 811, 831 (2003) (noting that the disagreement has centered on whether the term "waters of the United States" includes only "actually or potentially navigable waters" or whether it includes any waters under federal control pursuant to Congress' commerce power); Marni A. Gelb, Casenote, *Leslie Sale Co. v. United States: Have Migratory Birds Carried the Commerce Clause Across the Borders of Reason?*, 8 VILL. ENVTL. L.J. 291, 297-98 (1997) (noting that the ambiguity of both the definition and the scope of the term "navigable waters" has been a source of controversy and confusion). The House committee report on the FWPCA stated that the committee intended that "the term 'navigable waters' be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes." H.R. REP. NO. 92-911, at 131 (1972).

12. *See* Kaiser Aetna v. United States, 444 U.S. 164, 173 (1979). In *Kaiser Aetna*, the Court acknowledged its longstanding belief that the government's commerce power includes the power to regulate navigation. *Id.* The commerce power "'comprehends the control for that purpose, and to the extent necessary, of all the navigable waters of the United States which are accessible from a State other than those in which they lie.'" *Id.* (quoting Gilman v. City of Phila., 70 U.S. (3 Wall.) 713, 724-25 (1866)); *see also* The Daniel Ball, 77 U.S. (10 Wall.) 557, 563 (1870). The Court first defined waterways that fall within the scope of federal regulation as those that

> constitute navigable waters of the United States within the meaning of the acts of Congress, in contradistinction from the navigable waters of the States, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water.

Daniel Ball, 77 U.S. (10 Wall.) at 563; *see also Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 190 (1824). In *Gibbons*, Chief Justice Marshall explained that the government's power to regulate commerce inherently includes the right to regulate navigation: "this power has been exercised from the commencement of the government, has been exercised with the

merce Clause of the Constitution,[13] and it provided a strict interpretation of the government's control over the nation's waterways.[14] As time progressed, however, the scope of governmental control expanded as new interpretations of the Commerce Clause developed.[15] Throughout the nineteenth and twentieth centuries, the government's regulatory power stretched beyond actual or potential navigability to encompass non-navigable waters.[16] Thus, the boundary of the government's power became increasingly blurred.

The passage of the CWA in 1972 and its use of the term "waters of the United States"[17] greatly expanded the federal government's jurisdiction over the nation's waterways.[18] The use of such an ambiguous term also left open the potential for future expansion through agency and judicial interpretation.[19] Over time, the basis of the EPA's jurisdiction shifted

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consent of all, and has been understood by all to be a commercial regulation." *Gibbons*, 22 U.S. (9 Wheat.) at 190; *see also* Mank, *supra* note 11, at 824.

13. U.S. CONST. art. I, § 8, cl. 3. The Constitution provides that Congress has the power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." *Id.*; *see also* Mank, *supra* note 11, at 824 (noting that Congress' authority over navigation derives from the Commerce Clause).

14. *See Rapanos*, 126 S. Ct. at 2216.

15. *See id.* Following the passage of the FWPCA, courts no longer applied the strict, traditional notion of navigability to determine federal jurisdiction over water. *E.g.*, Natural Res. Def. Council, Inc. v. Callaway, 392 F. Supp. 685, 686 (D.D.C. 1975). Deferring to the judgment of the Army Corps of Engineers in concluding that "integral parts of the aquatic environment" deserve protection, courts broadened the notion of navigability to include wetlands adjacent to navigable waterways. United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 135 (1985).

16. Mank, *supra* note 11, at 826-30. For examples of the expansion of the government's regulatory power over water, see Quivira Mining Co. v. United States Environmental Protection Agency, 765 F.2d 126, 130 (10th Cir. 1985), holding that creeks that were not navigable in fact, but could negatively impact navigable waters, were covered by the CWA, and Treacy v. Newdunn Associates, 344 F.3d 407, 414-15 (4th Cir. 2003), recognizing that the Supreme Court had defined "navigable waters" to include wetlands that were not navigable in fact.

17. 33 U.S.C. § 1362(7) (2000) (defining "navigable waters").

18. William L. Andreen, *Beyond Words of Exhortation: The Congressional Prescription for Vigorous Federal Enforcement of the Clean Water Act*, 55 GEO. WASH. L. REV. 202, 215-18 (1987). Enforcement of the Clean Water Act relies upon a broad prohibition of the discharge of pollutants into the nation's waterways. *Id.* at 216. In order to ensure adequate enforcement, the Act "eliminated the procedural impediments to effective enforcement and created a wide array of sanctions for violations of the Act." *Id.* at 217. Thus, the Clean Water Act gave "the federal government enormous power to enforce the Act through administrative action and direct access to the courts to seek injunctive relief, civil monetary penalties, and even criminal sanctions." *Id.* at 217-18.

19. *See* H.R. REP. NO. 92-1465, at 144 (1972) (Conf. Rep.). The conference committee articulated that they "fully intend[ed] that the term 'navigable waters' be given the broadest possible constitutional interpretation unencumbered by agency determinations which ha[d] been made or may be made for administrative purposes." *Id.*; *see also* Jeremy Ward, Note, *If It's Worth a Dam, It's "Navigable Waters": A Proposed Revision of Section*

away from traditional notions of navigability, and waterways under federal control grew to include tributaries of navigable waterways and non-navigable wetlands adjacent to navigable waterways.[20] As government control over the nation's water expanded, the extent of the EPA's regulatory authority became increasingly difficult to predict.

The Supreme Court's recent decision in *Rapanos v. United States* presents an example of the confusion surrounding the continuing ambiguity of the CWA's language.[21] In *Rapanos*, the defendant, John A. Rapanos, wanted to develop a parcel of his land, consisting of "saturated fields," in Williams Township, Michigan.[22] Rapanos filled in wetlands on his property with sand without first obtaining a permit as required by the CWA.[23] Although the "nearest body of navigable water was 11 to 20 miles away,"[24] the federal government charged Rapanos with violating the CWA, spawning twelve years of criminal and civil litigation.[25] The case forced the Supreme Court to confront the issue of whether wetlands, which are in close proximity to waterways that "eventually empty into traditional navigable waters, constitute 'waters of the United States'" under the CWA.[26] A four-Justice plurality of the Court concluded that "only those wetlands with a continuous surface connection to bodies that are 'waters of the United States'" are covered by the CWA, and thus within the regulatory jurisdiction of the EPA.[27]

In light of the Supreme Court's decision in *Rapanos*, this Note examines the historical progression of the federal government's regulation of the nation's waterways, and specifically its jurisdiction pursuant to the CWA. This Note first examines the Supreme Court's early, strict inter-

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3(8) of the FPA Derived from Decisions Followed in FPL Energy Maine Hydro LLC v. FERC, 26 ENERGY L.J. 179, 185 (2005) (noting that, in analyzing the term "navigable waters" in the context of the Federal Power Act, "[o]verly broad interpretations of the term . . . by the courts have resulted in a definition so broad as to be tantamount to no definition at all").

20. *See* 33 C.F.R. § 328.3(a) (2006). The current federal regulations liberally define "waters of the United States" to include "[a]ll waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce," intrastate waters "the use, degradation or destruction of which could affect interstate or foreign commerce," tributaries of regulated waters, and wetlands adjacent to regulated waters. *Id.*; Mank, *supra* note 11, at 835-36 (reviewing the Corps' gradual broadening of its jurisdiction and Congress' failure to amend the CWA in response).

21. Rapanos v. United States, 126 S. Ct. 2208 (2006) (plurality opinion).

22. *Id.* at 2214.

23. *See id.*

24. *Id.*

25. *Id.* at 2214-15.

26. *Id.* at 2219.

27. *Id.* at 2226. Justice Scalia announced the judgment of the Court, and Chief Justice Roberts, and Justices Thomas and Alito joined his opinion. *Id.* at 2214. Justice Kennedy concurred only in the judgment of the Court. *Id.* at 2236.

pretation of the government's jurisdiction. Next, this Note analyzes the historical developments that gradually expanded this jurisdiction and marked a departure from the traditional notions of federal jurisdiction over water. This Note then considers the impact of the passage of the CWA and the vagueness and ambiguity that arose in the law and its enforcement. This Note then analyzes the plurality, concurring, and dissenting opinions of *Rapanos v. United States*, focusing on the weaknesses of the plurality's traditional, restrictive definition of "navigable waters," which departs from the Court's prior decisions, disregards the CWA's underlying purpose, and fails to defer to agency interpretation. Finally, this Note argues in favor of the reasoning in the concurring and dissenting opinions due to their consistency with prior CWA jurisprudence and their understanding of the need for more effective environmental protection.

I. CONGRESS' COMMERCE POWER: THE BEDROCK OF GOVERNMENTAL WATER REGULATION

A. The Origins of Waterway Regulation: Protecting the Streams of Commerce

The federal government's authority to regulate the nation's waterways derives from the Commerce Clause of the Constitution.[28] Given Congress' power to regulate commerce "among the several States,"[29] the Supreme Court recognized in its 1824 decision of *Gibbons v. Ogden* that the "power to regulate navigation" is an inherent product of the commerce power.[30] In *Gibbons*, Aaron Ogden filed an injunction action against Thomas Gibbons for violating New York state laws that granted Ogden the exclusive right to operate steam boats between New York and New Jersey.[31] In response, Gibbons argued that he had the right to navigate the same waterways, pursuant to an act of Congress passed in February of 1793 providing for the licensing of ships used in coastal trade and fishing.[32] In considering the issue of whether New York had the authority to

28. *See supra* note 13.

29. U.S. CONST. art. I, § 8, cl. 3.

30. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 193 (1824). The Court explained that the word "commerce," as used in the Constitution, "comprehends, and has been always understood to comprehend, navigation within its meaning." *Id.* In the Court's view of the Commerce Clause, the "power to regulate navigation, is as expressly granted, as if that term had been added to the word 'commerce.'" *Id.*

31. *Id.* at 1-2 (explaining that the New York state legislature initially granted the right of exclusive navigation to Robert R. Livingston and Robert Fulton, who together later assigned the right to John R. Livingston, who then transferred the right to Ogden).

32. *See id.* at 2. The Act Gibbons cited was entitled "'An Act for enrolling and licensing ships and vessels to be employed in the coasting trade and fisheries, and for regulating the same.'" *Id.*

grant exclusive navigation rights in the face of congressional action, the Supreme Court held that the state action was constitutionally impermissible.[33] The Court reasoned that under Congress' commerce power, the federal government had the inherent authority to regulate navigation.[34] *Gibbons* thus reflects the early belief that the Commerce Clause is the source of the federal government's authority to regulate the nation's waters.[35]

Despite the rule established in *Gibbons* that Congress may regulate navigable waters affecting commerce,[36] courts still faced the issue of how to determine the navigability of a particular waterway.[37] Addressing this issue in *The Daniel Ball*, the Supreme Court established the first test of "navigability."[38] In this case, the United States sued the owners of a steam ship for violating a law requiring the inspection and licensing of any ships transporting passengers or cargo upon the navigable waters of

33. *Id.* at 240. The Court held that "so much of the several laws of the State of New-York, as prohibits vessels, licensed according to the laws of the United States, from navigating the waters of the State of New-York, . . . is repugnant to the constitution, and void." *Id.*

34. *Id.* at 190. The Court explained that "[a]ll America understands, and has uniformly understood, the word 'commerce,' to comprehend navigation." *Id.* Commerce has been understood to include navigation since the framing of the Constitution, and "[t]he power over commerce, including navigation, was one of the primary objects for which the people of America adopted their government, and must have been contemplated in forming it." *Id.*; *see also* Mank, *supra* note 11, at 824 (explaining that Chief Justice Marshall conceived of "commerce" in broad terms, as "'the commercial intercourse between nations, and parts of nations, in all its branches,'" because a system that regulates commerce could not feasibly exclude navigation).

35. *See* United States v. Appalachian Elec. Power Co., 311 U.S. 377, 404 (1940) ("[I]t was held early in our history that the power to regulate commerce necessarily included power over navigation." (citing *Gibbons*, 22 U.S. (9 Wheat.) at 189)). Congress may regulate the channels of commerce, which include the nation's "navigable waters." Matthew B. Baumgartner, Note, SWANCC*'s Clear Statement: A Delimitation of Congress's Commerce Clause Authority to Regulate Water Pollution*, 103 MICH. L. REV. 2137, 2140-41 (2005) (citing United States v. Ashland Oil & Transp. Co., 504 F.2d 1317 (6th Cir. 1974)). This "navigable waters doctrine was traditionally a subset of the channels-of-commerce power and dates back to Chief Justice Marshall's opinion in *Gibbons v. Ogden*." *Id.* at 2141.

36. *See* United States v. Commodore Park, Inc., 324 U.S. 386, 390 (1945) (reaffirming the "dominant power of the [federal] government to control and regulate navigable waters in the interest of commerce"); United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53, 63 (1913) (quoting Gilman v. City of Phila., 70 U.S. (3 Wall.) 713, 724 (1866)); *see also* Mank, *supra* note 11, at 824 ("The Supreme Court has recognized that Congress may implement its commerce power over navigation by regulating navigable waters that serve as channels of interstate and foreign commerce.").

37. *See* The Daniel Ball, 77 U.S. (10 Wall.) 557, 563 (1870). Reasoning that the common law standard for navigability, based on whether the tide affected a body of water, was unworkable in the United States, the Court established a different test for determining the navigability of the nation's waters, based on whether a body of water was navigable-in-fact. *Id.*

38. *Id.*; *see also* Mank, *supra* note 11, at 826.

the United States.[39] The ship operated on Grand River in Michigan, transporting passengers and cargo between Grand Rapids, Michigan and Grand Haven, Michigan "without having been inspected or licensed."[40] The critical issue was whether the ship operated on a navigable water of the United States, thus subjecting it to the regulations of Congress.[41]

On the issue of navigability, the Supreme Court held that rivers are navigable when they are "navigable in fact."[42] This rule conflicted with the common law rule which relied upon "the ebb and flow of the tide."[43] The Court then set out the rule that rivers are navigable in fact when they are used or are capable of being used for commerce.[44] In order to distinguish navigable waters of the United States from navigable waters of the states, the Court added that rivers are navigable waters of the United States when they may be used to conduct commerce not merely within a state, but with other states or foreign countries.[45] Through this decision,

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39. *See Daniel Ball*, 77 U.S. (10 Wall.) at 558-59 (explaining that the law required "the inspection of vessels propelled in whole or in part by steam and carrying passengers, and the delivery to the collector of the district of a certificate of such inspection, before a license, register, or enrolment [sic] . . . can be granted").

40. *Id.* at 558.

41. *Id.* at 562. The district court held that Grand River was not a navigable water of the United States. *See* The Daniel Ball, 6 F. Cas. 1161, 1165 (W.D. Mich. 1876) (No. 3564). The district court dismissed the suit in order to maintain uniformity of decisions among the Michigan district courts. *Id.* at 1164-65. In reaching this decision, the court analyzed the holdings of other cases in the state where, as in this case, the ship traveled only within the state of Michigan. *Id.* at 1162-63. In these cases, it was held that the commerce was internal and subject only the laws of Michigan. *Id.* at 1163. Therefore, federal control over such activities was found unconstitutional. *Id.* at 1162-63. The circuit court of appeals reversed and the owners of the vessel appealed to the Supreme Court. *Daniel Ball*, 77 U.S. (10 Wall.) at 559-60.

42. *Daniel Ball*, 77 U.S. (10 Wall.) at 563.

43. *Id.* (noting how the Court's rule of navigability should be distinguished from the common law rule of England, where waters were considered navigable when they were subject to the "ebb and flow of the tide"). The Court explained the common law rule would be difficult to apply in the United States because many rivers are navigable for hundreds of miles, where the waters are unaffected by the ebb and flow of the tide. *Id.*; *see also* Mank, *supra* note 11, at 826 (discussing the Supreme Court's earlier holding departing from the common law rule, that "admiralty and maritime jurisdiction of the United States extend[s] beyond waters subject to the ebb and flow of the tide . . . to actually navigable lakes and rivers used in interstate commerce") (citing The Propeller Genesee Chief v. Fitzhugh, 53 U.S. (12 How.) 443, 453-58 (1851)).

44. *Daniel Ball*, 77 U.S. (10 Wall.) at 563 ("[Rivers] are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.").

45. *Id.* In order to distinguish between "waters of the States" and "waters of the United States," the Court further explained that rivers are the latter "when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water." *Id.*

the Court not only reaffirmed the federal government's jurisdiction over water and navigation based upon the Commerce Clause, but also provided clearer commercial guidelines by which courts could determine navigability on a case-by-case basis.[46]

In applying this rule to the facts in *The Daniel Ball*, the Court reasoned that the Grand River was a navigable water of the United States.[47] The river could hold large ships carrying passengers and cargo, which could navigate on the river for a distance of forty miles.[48] Most importantly, however, the river's junction with Lake Michigan "form[ed] a continued highway for commerce, both with other States and with foreign countries, and [was] thus brought under the direct control of Congress in the exercise of its commercial power."[49] *The Daniel Ball*, in conjunction with *Gibbons v. Ogden*, thus represent the early view that commercial navigability of a waterway is the key test of federal jurisdiction.[50]

B. Expansion of Federal Jurisdiction Under the Navigability Standard

In response to the judicial recognition of Congress' authority over the nation's navigable waterways, Congress began to enact legislation that gradually expanded the scope of its authority.[51] In 1899, for example, Congress passed the Rivers and Harbors Appropriation Act,[52] which enabled the federal government to protect navigable waters from obstructions.[53] Through this Act, Congress enlarged its jurisdiction beyond strictly navigable waters to include any waterways, regardless of their navigability, that directly impacted the conditions of the navigable wa-

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46. *Id.* at 563-64.
47. *Id.* at 564.
48. *Id.*
49. *Id.*
50. *See supra* notes 33-35, 42-46 and accompanying text.
51. Mank, *supra* note 11, at 826 (noting that in the late nineteenth century, the Supreme Court and Congress began to expand federal jurisdiction over water).
52. Rivers and Harbors Appropriation Act of 1899, ch. 425, 30 Stat. 1121 (1899) (codified as amended at 33 U.S.C. § 401 (2000)).
53. *E.g.*, *id.* §§ 9-10, 30 Stat. at 1151. Section 9 of the Act provides:

> it shall not be lawful to construct or commence the construction of any bridge, dam, dike, or causeway over or in any port, roadstead, haven, harbor, canal, navigable river, or other navigable water of the United States until the consent of Congress to the building of such structures shall have been obtained and until the plans for the same shall have been submitted to and approved by the Chief of Engineers and by the Secretary of War.

Id. § 9. Section 10 provides that "the creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is hereby prohibited." *Id.* § 10; *see also* Mank, *supra* note 11, at 827 (explaining that, despite the use of the phrase "navigable water of the United States" in section 9 and the broader phrase "waters of the United States" in section 10, courts have interpreted both to encompass only navigable waters).

terways.[54] This expansion of federal authority over water foreshadowed a more general expansion of the commerce power during the New Deal era.[55]

C. Revisiting The Daniel Ball*: The Court's Departure from the Traditional Navigability Standard*

During the late nineteenth and early twentieth centuries, Congress began to depart from the traditional navigability doctrine.[56] As Congress continued to assert control over navigable waters, the navigability standard set forth in *The Daniel Ball* lost its influence as the only justification for federal control, and the very definition of navigability was challenged.[57]

In *United States v. Appalachian Electric Power Co.*, the Supreme Court established new, expanded guidelines for determining navigability and provided more extensive justifications for federal water regulation.[58] In

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54. *See* Rivers and Harbors Appropriation Act § 13, 30 Stat. at 1152. Section 13 provides that:

> it shall not be lawful to throw, discharge, or deposit, or cause suffer, or procure to be thrown, discharged, or deposited . . . any refuse matter of any kind or description . . . into any navigable water of the United States, or into any *tributary of any navigable water* from which the same shall float or be washed into such navigable water.

Id. (emphasis added). Section 13 also states that:

> it shall not be lawful to deposit, or cause, suffer, or procure to be deposited material of any kind in any place on the bank of any navigable water, *or on the bank of any tributary of any navigable water*, where the same shall be liable to be washed into such navigable water . . . whereby navigation shall or may be impeded or obstructed.

Id. (emphasis added).

55. Christina E. Coleman, Note, *The Future of the Federalism Revolution:* Gonzales v. Raich *and the Legacy of the Rehnquist Court*, 37 LOY. U. CHI. L.J. 803, 810 (2006) (noting that, beginning in 1937, the Supreme Court rendered a series of decisions that "greatly expand[ed]" the boundaries of the federal commerce power). In *NLRB v. Jones & Laughlin Steel Corp.*, the Court held that intrastate activities could be regulated through the commerce power, if they had "such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions." 301 U.S. 1, 36-37 (1937). The Court further held in *Wickard v. Filburn* that even a non-commercial intrastate activity "may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce." 317 U.S. 111, 125 (1942). Although an activity may have only a negligible economic effect by itself, federal regulation is justified where the effect of that activity, "taken together with that of many others similarly situated, is far from trivial." *Id.* at 127-28. The "substantial effect" test of *Wickard* represented the pinnacle of New Deal-era expansion of the commerce power. Coleman, *supra*, at 811.

56. Mank, *supra* note 11, at 826-28 (explaining that during the twentieth century, courts increasingly expanded their interpretation of Congress' commerce power, which resulted in further expansion of the federal power over navigation).

57. *See infra* notes 58-79 and accompanying text.

58. *See* United States v. Appalachian Elec. Power Co., 311 U.S. 377 404-10, 426-27 (1940). The Court recently noted that in the decades following *Jones & Laughlin*, as federal regulation over water slowly expanded, Congress came to possess "considerably

Appalachian, the Court considered federal jurisdiction over water pursuant to sections 9 and 10 of the Rivers and Harbors Appropriation Act of 1899 and the Federal Water Power Act of 1920.[59] The case involved the proposed construction of the Radford Dam on the New River in Virginia.[60] Under the Federal Water Power Act of 1920, the Federal Power Commission assumed authority to license the construction of dams on navigable waterways.[61] Those proposing to construct a dam on a non-navigable waterway were required to file a declaration with the Commission.[62]

During the pre-construction phase of the Radford Dam Project, which began in June of 1925, the development company filed a declaration of intention with the Federal Power Commission.[63] After an investigation, the Commission determined that the New River was not a navigable waterway under the Federal Water Power Act.[64] However, because the Radford Dam would interfere with interstate and foreign commerce, the project required a license.[65] As a result, the Commission issued a standard form license, which included terms unrelated to navigation.[66] The development company rejected the terms of the standard license, but

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greater latitude in regulating conduct and transactions under the Commerce Clause than [the Court's] previous case law permitted." United States v. Morrison, 529 U.S. 598, 608 (2000). However, the Court reiterated the caution it first raised in *Jones & Laughlin* that the scope of Congress' commerce power

> "must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government."

Id. (quoting United States v. Lopez, 514 U.S. 549, 556-57 (1995)); *see also* Mank, *supra* note 11, at 828 (noting that, between *Jones & Laughlin* and *Lopez*, most legislation under the Commerce Clause received only deferential review, without the Court considering whether an activity directly or indirectly affected interstate commerce).

59. *Appalachian*, 311 U.S. at 398-99.

60. *Id.*

61. *Id.*

62. *Id.* at 399. If the Commission determined that the construction of the proposed dam would interfere with interstate or foreign commerce, a license was required; but if no such interference would result, then the construction of the dam could continue without a license. *Id.*

63. *Id.* The New River Development Company filed the declaration of intention for the project, which was later assigned to the Appalachian Electric Power Company. *Id.*

64. *Id.* at 399-400.

65. *Id.* at 400. In a report requested from the Commission, the Chief of Engineers of the War Department originally reported that the river was a navigable waterway. *Id.* at 399. In a second report at the Commission's request, however, he concluded that it was not a navigable waterway, and the Commission held its hearing on the declaration of intention based upon this second finding. *Id.*

66. *Id.*

offered to accept a lesser license.[67] The Commission refused to grant a lesser license, and in October of 1932, made a new determination that the New River was navigable.[68]

Despite lacking a license, the development company began construction of the dam, and the United States filed suit for an injunction or a mandatory order of removal.[69] The United States alleged that the New River was navigable, that the dam would interfere with interstate and foreign commerce, and that its construction without a permit violated the Rivers and Harbors Appropriation Act and the Federal Water Power Act.[70] The trial court determined that the New River was not a navigable water of the United States and that the dam would not interfere with interstate and foreign commerce.[71] The court of appeals affirmed and the Supreme Court granted certiorari.[72]

After reviewing the facts and the conditions of the New River, the Court held that the New River should be considered a navigable waterway.[73] In light of the use of certain sections of the river for both commercial and private purposes, and the condition of the section of river in question, the Court determined that it was within the scope of federal control.[74] The Court reasoned that the test for federal control over water was not only whether the waterway was actually navigable, but also

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67. *Id.* The requested license only included "conditions as would protect the interests of the United States in navigation." *Id.*

68. *Id.* at 400-01. Prior to the Commission's new determination of navigability, the Appalachian Electric Power Company filed suit against the Commission to "remove a cloud on its title" and to prevent the Commission from interfering with Appalachian's property. *Id.* at 401. That case was later dismissed on jurisdictional grounds. *Id.*

69. *Id.*

70. *Id.*

71. United States v. Appalachian Elec. Power Co., 23 F. Supp. 83, 92 (W.D. Va. 1938), *aff'd*, 107 F.2d 769 (4th Cir. 1939), *rev'd*, 311 U.S. 377 (1940). The court described the condition of the New River, explaining that it ran "over a bed of rocks and ledges" and that it was "a stream of irregular but steep descent and of high velocity." *Id.* at 91. The court described the lower portion of the New River as "the most turbulent and precipitous of the entire river," which "forms a barrier between the navigable Kanawha [River] and any possibly navigable waters of the New [River]." *Id.* In addition, the court noted that no substantial commerce or navigation occurred on the river. *Id.* at 98. Any commerce or navigation that did exist was "entirely local and in a trivial and unnoticeable amount." *Id.*

72. *Appalachian*, 311 U.S. at 403.

73. *Id.* at 416-19.

74. *Id.* In support of its argument, the Government highlighted the use of "favorable stretches" of the river for boating and navigation. *Id.* at 417. It used such examples to argue that improving other sections of the river for navigation purposes was economically feasible. *Id.* at 417-18. The Court held that "[f]rom the use of the Radford-Wiley's Falls stretch and the evidence as to its ready improvability at a low cost for easier keelboat use, [it could] conclude that [the] section of the New River [at issue was] navigable." *Id.* at 418.

whether it was potentially navigable, with reasonable improvements.[75] Finally, the Court found that a waterway need not be used continuously to meet the "navigability" test.[76]

In addition to establishing an expanded test for navigability, the Court reasoned that federal regulation of water under the commerce power was based on more than just navigation.[77] Rather, the commerce power allowed Congress to consider other factors, such as flooding, that may impact interstate commerce.[78] Thus, *Appalachian* represented a significant departure from the traditional rule set forth in *The Daniel Ball*, setting the stage for the further broadening of the federal power to regulate the nation's waterways.[79]

D. The Clean Water Act: A New Chapter in Federal Water Regulation

In 1972, Congress enacted the Federal Water Pollution Control Act Amendments of 1972 (FWPCA), later known as the Clean Water Act (CWA).[80] The objective of the CWA was to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[81] In order to achieve this objective, the CWA sought to eliminate the discharge of pollutants into navigable waters.[82] Thus, the CWA continued to use the concept of "navigable waters," defined as "the waters of the

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75. *Id.* at 407-09. The Court stated that it was "proper to consider the feasibility of interstate use after reasonable improvements which might be made." *Id.* at 409.

76. *Id.* The Court noted that although "[t]he character of the region, its products and the difficulties or dangers of the navigation influence the regularity and extent of the use," such factors do not affect the navigability of a waterway "in the constitutional sense." *Id.* at 409-10.

77. *Id.* at 426.

78. *Id.* ("[T]he authority of the United States is the regulation of commerce on its waters. Navigability . . . is but a part of this whole. Flood protection, watershed development, [and] recovery of the cost of improvements through utilization of power are likewise parts of commerce control."). Congress can consider factors such as flood protection in determining its authority over water because "[t]he power to regulate interstate commerce embraces the power to keep the navigable rivers of the United States free from obstructions to navigation and to remove such obstructions when they exist." Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 328-29 (1936).

79. *See* Mank, *supra* note 11, at 829-30 (noting that cases subsequent to *Appalachian* gradually enlarged the federal government's jurisdiction "over non-navigable tributaries of navigable waters" and that the Rivers and Harbors Appropriation Act of 1899 began to be read more broadly, such that by the early 1970s, Congress considered formally expanding the Act).

80. Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 (codified as amended at 33 U.S.C.A. §§ 1251-1387 (West 2001 & Supp. 2006)). The FWPCA was amended in 1977, when it became known as the Clean Water Act. Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566.

81. Federal Water Pollution Control Act Amendments of 1972, sec. 2, § 101(a), 86 Stat. at 816 (codified as amended at 33 U.S.C. § 1251(a) (2000)).

82. *Id.* § 101(a)(1), (3) (codified as amended at 33 U.S.C. § 1251(a)(1), (3) (2000)).

United States, including the territorial seas."[83] Over time, judicial interpretations of the CWA and the meaning of the phrase "waters of the United States" have pushed the scope of the government's jurisdiction to new limits and raised new issues concerning the government's regulatory authority.[84]

E. Natural Resources Defense Council, Inc. v. Callaway*: Setting the Standard for the CWA Era*

Following the passage of the CWA, lower courts attempted to establish the scope of the government's jurisdiction under the CWA as defined by the phrase "waters of the United States." In *Natural Resources Defense Council, Inc. v. Callaway*, Howard H. Callaway, Secretary of the Army, and Lt. Gen. William C. Gribble, Chief of the Army Corps of Engineers, defended regulations that redefined "navigable waters."[85] The new definition encompassed only those waters strictly related to commerce.[86] Conservation groups filed suit in the United States District Court for the District of Columbia, claiming that the definition was too limited.[87] In an order without an opinion, the court held that the defendants had acted outside the scope of their authority in defining the term, reasoning that in passing the CWA, Congress must have intended to depart from the traditional tests of navigability and assert federal control over water to the maximum possible extent.[88] In upholding the broadest interpretation of the statute's definition, the court in *Callaway* followed the holding in *Appalachian* that the traditional notions of navigability from *The Daniel Ball* were no longer to be strictly applied.[89]

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83. *Id.* § 502(7), 86 Stat. at 886 (codified as amended at 33 U.S.C. § 1362(7) (2000)).

84. *See infra* notes 85-112 and accompanying text.

85. Natural Res. Def. Council, Inc. v. Callaway, 392 F. Supp. 685, 686 (D.D.C. 1975).

86. 33 C.F.R. § 209.260(c) (1974). The regulations defined navigable waters as "those waters which are presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce." *Id.*

87. *See Callaway*, 392 F. Supp. at 685-86.

88. *Id.* at 686. The court reasoned that "Congress by defining the term 'navigable waters' . . . to mean 'the waters of the United States, including the territorial seas,' asserted federal jurisdiction over the nation's waters to the maximum extent permissible under the Commerce Clause of the Constitution." *Id.* As a result, the court concluded that "as used in the [CWA], the term is not limited to the traditional tests of navigability." *Id.* The court ordered the defendants to complete a number of steps to correct their erroneous actions. *Id.* These steps included: (1) revoking and rescinding the relevant regulatory provisions, (2) publishing proposed regulations that would conform with the court's interpretation of federal jurisdiction over water, and (3) publishing final regulations that would recognize Congress' full jurisdiction. *Id.*

89. *See id.*

F. Wetland Regulation: Maximizing the Government's Authority Under the CWA

In light of the trend evidenced in *Callaway* that federal jurisdiction should not be limited by traditional tests of navigability, the Supreme Court began to confront issues concerning the government's ever-expanding jurisdiction under the CWA. One such issue, first considered in *United States v. Riverside Bayview Homes, Inc.*, involved federal jurisdiction over wetlands.[90] In *Riverside*, the defendant filled wetlands on its property in order to prepare the land for the construction of a housing development.[91] In response, the Army Corps of Engineers filed suit in the United States District Court for the Eastern District of Michigan, claiming that the CWA required the defendant to obtain a permit before filling wetlands adjacent to a navigable waterway.[92] The trial court agreed with the Corps, and prohibited the filling of the wetlands without a permit.[93] On appeal, the Sixth Circuit remanded, and the trial court again held that the property constituted a wetland.[94] When appealed a second time, the circuit court reversed, and the Supreme Court granted certiorari.[95]

The Court held that wetlands adjacent to a navigable waterway are covered by the CWA, and that the CWA therefore required the defendant to obtain a permit to deposit fill on the property.[96] The Court reasoned that the facts highlighted the importance of wetlands, regardless of whether a wetland's waters originated in an adjacent body of water.[97]

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90. United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 123 (1985). The Court's discussion of the issue began by referring to the definition of wetlands in the Corps' regulations:

> "The term 'wetlands' means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas."

Id. at 124 (quoting 33 C.F.R. § 323.2(c) (1978)).

91. *Id.*

92. *Id.*

93. *Id.* at 125. In reviewing the facts, the district court determined that the property was "'characterized by the presence of vegetation that require[d] saturated soil conditions for growth and reproduction,' and that the source of the saturated soil conditions on the property was ground water." *Id.* at 130-31 (citation omitted). In addition, the trial court determined that the area of saturated soil extended to Black Creek—a navigable waterway. *Id.* at 131. The Supreme Court therefore held that "respondent's property is a wetland adjacent to a navigable waterway." *Id.*

94. *Id.* at 125.

95. *Id.* at 125-26.

96. *Id.* at 135.

97. *Id.* The Court explained that "the Corps has concluded that wetlands adjacent to lakes, rivers, streams, and other bodies of water may function as integral parts of the aquatic environment even when the moisture creating the wetlands does not find its source

Therefore, "waters of the United States" includes "all wetlands adjacent to other bodies of water over which the [government] has jurisdiction."[98] In this way, *Riverside* represents a further expansion of federal jurisdiction over water, and provides additional articulation from the Court as to the meaning of "waters of the United States."[99]

Despite the holding in *Riverside* placing wetlands adjacent to navigable waterways within the jurisdiction of the CWA, the Court faced further issues concerning the reach of the CWA over wetlands.[100] In *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC)*, the plaintiff, a consortium of Chicago municipalities, sought to use an abandoned sand and gravel pit to dispose of non-hazardous solid waste.[101] After purchasing the property on which the pit was located, the plaintiff contacted the Corps to determine if the CWA required them to obtain a permit to fill the permanent and seasonal ponds also located on the property.[102] Following an investigation, the Corps determined that the ponds were "waters of the United States" within the reach of the CWA.[103] The plaintiff filed suit challenging federal jurisdic-

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in the adjacent bodies of water." *Id.* at 134-35 (citing 33 C.F.R. § 320.4(b)(2) (2006) (listing the various functions that wetlands perform)).

98. *Id.* at 135.

99. *See* Mank, *supra* note 11, at 840. The Court did not provide a precise definition of the term "adjacent." *Id.* Instead, "the Court implicitly approved the Corps' 1985 definition of 'adjacent,' which remains the definition today: 'The term adjacent means bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are adjacent wetlands.'" *Id.* (quoting 33 C.F.R. § 323.2(d) (1985)). *Compare* 33 C.F.R. § 323.2(d) (1985) (defining "adjacent"), *with* 33 C.F.R. § 328.3(c) (2006) (same). Although the Court did not provide clear distance guidelines as to what constitutes an adjacent wetland, the decision "suggests that hydrological and biological connections between non-navigable waters and navigable waters should be important in determining whether other non-navigable waters are within the scope of the Act." Mank, *supra* note 11, at 840. "Hydrological" is a form of the word "hydrology," which is a science "concerned with the properties, occurrence, distribution and movement of water on and beneath the surface of the land." Ronald Kaiser & Frank F. Skillern, *Deep Trouble: Options for Managing the Hidden Threat of Aquifer Depletion in Texas*, 32 TEX. TECH L. REV. 249, 254 n.18 (2001).

100. *See* James K. Jackson & William A. Nitze, *Wetlands Protection Under Section 404 of the Clean Water Act—The* Riverside Bayview *Decision, its Past and Future*, 7 PUB. LAND L. REV. 21, 41 (1986) (arguing that the Court's decision in *Riverside* left several issues unresolved concerning the regulation of wetlands under the CWA, including the issue of whether the federal government had jurisdiction over "'isolated wetlands' which are not adjacent to other waters").

101. 531 U.S. 159, 162-63 (2001).

102. *Id.* at 163.

103. *Id.* at 164. The Corps made this determination based upon the provisions of its "Migratory Bird Rule." *Id.* In 1986, the Corps attempted to clarify the scope of its jurisdiction over water by formulating the Migratory Bird Rule, which in relevant part extends its jurisdiction to intrastate waters "[w]hich are or would be used as habitat by birds protected by Migratory Bird Treaties; or [w]hich are or would be used as habitat by other

tion over the property and the Corps' failure to grant them a permit, but the trial court granted summary judgment in favor of the Corps.[104] On appeal, the appellate court affirmed and the Supreme Court granted certiorari.[105]

Despite the defendant's argument that the ponds fell within the scope of the CWA's regulatory reach given the extension of federal jurisdiction in *Riverside*, the Court in *SWANCC* held that federal jurisdiction under the CWA does not extend to bodies of water that are not adjacent to open water.[106] The Court explained that "[i]t was the significant nexus between the wetlands and 'navigable waters' that informed [its] reading of the CWA in *Riverside*."[107] Thus, the Court's decision in *SWANCC* was important because it placed a limit on the expansion of federal jurisdiction over the nation's waterways.[108]

The Court's consideration of the adjacency issue in *SWANCC* was also significant because it resolved a split in the circuits over the extent to which non-navigable waters were covered by the CWA.[109] Prior to *SWANCC*, courts differed in their application of the "'adjacency' requirement" for non-navigable water.[110] The Fifth Circuit, for example, required that such waters be actually adjacent to navigable waters in order for the CWA to apply.[111] The Fourth, Sixth, Seventh, and Ninth Circuits, however, had held that while "a hydrological connection between the non-navigable and navigable waters [was] required," the non-navigable waters did not need to be directly adjacent to navigable wa-

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migratory birds which cross state lines." *Id.* (quoting 51 Fed. Reg. 41,206, 41,217 (Nov. 13, 1986)). Because a number of migratory bird species were observed at the site, the Corps determined that the property was within its jurisdiction. *Id.*

104. *Id.* at 165.

105. *Id.* at 166.

106. *Id.* at 168. The Court also held that the Migratory Bird Rule is not supported by the CWA because the true gauge of the Corps' jurisdiction is the relationship between the waters in question and navigable waters. *Id.* at 171-72. Allowing wholly isolated waters to be regulated due to the presence of migratory birds would "assume that the use of the word navigable in the [CWA] . . . does not have any independent significance." *Id.* at 172 (internal quotation marks omitted).

107. *Id.* at 167.

108. *See id.* at 167, 171-72. While federal jurisdiction under the CWA does not depend upon traditional notions of navigability and regulated waterways need not be navigable at all, a "significant nexus" must exist between a body of water and a navigable body of water in order to invoke CWA jurisdiction. *Id.* at 167-72.

109. *See* United States v. Rapanos, 376 F.3d 629, 639 (6th Cir. 2004), *vacated*, 126 S. Ct. 2208 (2006).

110. *See id.* (noting the circuit split over the construction of the "adjacency" requirement).

111. *E.g.*, *In re* Needham, 354 F.3d 340, 345 (5th Cir. 2003) (stating that the CWA is "not so broad as to permit the federal government to impose regulations over 'tributaries' that are neither themselves navigable nor truly adjacent to navigable waters").

ters.[112] Thus, *SWANCC* represented the Court's attempt to resolve the adjacency controversy and signaled the direction the Court would take in the future.[113]

II. *RAPANOS V. UNITED STATES*: RE-ESTABLISHING LIMITS ON THE REACH OF THE CWA

In the face of continuing controversy concerning the government's jurisdictional limits under the CWA,[114] the Supreme Court again confronted the issue of what constitutes "waters of the United States" in *Rapanos v. United States*.[115] Rapanos and his wife owned several pieces of

112. *See Rapanos*, 376 F.3d at 639 (stating that the Sixth Circuit would follow the majority of the circuit courts in interpreting *Riverside* and *SWANCC*). The Fourth Circuit held in *United States v. Deaton* that "the Corps's regulatory interpretation of the term 'waters of the United States' as encompassing nonnavigable tributaries of navigable waters does not invoke the outer limits of Congress's power or alter the federal-state framework." 332 F.3d 698, 708 (4th Cir. 2003). Therefore, "the federal assertion of jurisdiction over nonnavigable tributaries of navigable waters is constitutional." *Id.*; *see also* United States v. Ashland Oil & Transp. Co., 504 F.2d 1317, 1327 (6th Cir. 1974). Because water moves freely between non-navigable tributaries and navigable waterways, "[p]ollution control of navigable streams can only be exercised by controlling pollution of their tributaries." *Ashland*, 504 F.2d at 1327. Pollution control of tributaries is crucial because the pollution of tributaries will most likely substantially affect the navigable waterways into which they flow. *Id.* at 1329; *see also* United States v. Gerke Excavating, Inc., 412 F.3d 804, 807 (7th Cir. 2005). Interpreting the Clean Water Act to allow regulation of any wetlands connected to navigable waters is not forbidden by the Constitution. *Gerke*, 412 F.3d at 807. Regardless of whether "the wetlands are 100 miles from a navigable waterway or 6 feet, if water from the wetlands enters a stream that flows into the navigable waterway, the wetlands are 'waters of the United States' within the meaning of the Act." *Id.*; *see also* Headwaters, Inc. v. Talent Irrigation Dist., 243 F.3d 526, 533-34 (9th Cir. 2001). Non-navigable irrigation canals that exchange water with streams and lakes are "waters of the United States." *Headwaters*, 243 F.3d at 533. The Ninth Circuit noted in *Headwaters* that "[t]he Clean Water Act is concerned with the pollution of tributaries as well as with the pollution of navigable streams." *Id.* at 534.

113. *See* Rapanos v. United States, 126 S. Ct. 2208, 2217-19, 2226-33 (2006) (relying on the reasoning in *SWANCC* to determine the adjacency of non-navigable wetlands to navigable waters).

114. *See* Rice v. Harken Exploration Co., 250 F.3d 264, 269 (5th Cir. 2001). In *Rice*, the court examined the Supreme Court's reasoning in *SWANCC* and noted that "it appears that a body of water is subject to regulation under the CWA if the body of water is actually navigable or is adjacent to an open body of navigable water." *Id.*; *see also* United States v. Hubenka, 438 F.3d 1026, 1035 (10th Cir. 2006). Discussing *Rice*, the Tenth Circuit in *Hubenka* explained that "[t]he Fifth Circuit concluded that a 'significant nexus' occurs only when a nonnavigable water is actually adjacent to a navigable water." *Hubenka*, 438 F.3d at 1034. Thus, according to the Fifth Circuit, tributaries are not considered adjacent to the navigable waters into which they flow. *Id.* The court in *Hubenka*, however, took the view that the Supreme Court did not endorse such a narrow interpretation of "significant nexus." *Id.* Rather, given the congressional concern for water pollution which influenced the passage of the CWA, "the potential for pollutants to migrate from a tributary to navigable waters downstream constitutes a 'significant nexus' between those waters." *Id.*

115. *Rapanos*, 126 S. Ct. 2008.

property in Michigan.[116] In order to develop a shopping center on one of these sites, known as the Salzburg site, Mr. Rapanos contacted the state to inspect the property and issue a permit for construction.[117] Upon inspection, the state discovered that although "the nearest body of navigable water was 11 to 20 miles away,"[118] the property likely contained regulated wetlands.[119] The state decided it would permit development on the site, however, if Rapanos obtained the necessary permits.[120]

In order to obtain the permits, Rapanos hired Dr. Goff, a consultant, to inspect the Salzburg site and prepare a report describing the presence of wetlands on the property.[121] Dr. Goff's final report indicated that "there were between 48 and 58 acres of wetlands on the site."[122] In response, Rapanos instructed Dr. Goff to destroy the report and any references to Rapanos that Dr. Goff had in his files.[123] In addition, Rapanos threatened Dr. Goff, stating that "he would 'destroy' Dr. Goff if he did not comply, claiming that he would do away with the report and bulldoze the site himself, regardless of Dr. Goff's findings."[124]

Despite the presence of the wetlands and the absence of the required permits, Rapanos proceeded to prepare the land for development by "leveling the ground, filling in low spots, clearing brush, removing stumps, moving dirt, and dumping sand to cover most of the wetland

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116. *Rapanos*, 376 F.3d at 632. Rapanos owned six parcels of land in Bay, Midland, and Saginaw Counties. *Id.* Known as the Salzburg, Hines Road, Pine River, Freeland, Mapleton, and Jefferson Avenue sites, each became a basis of liability for the Rapanoses as they were charged with environmental violations at each of these sites between 1988 and 1997. *Id.* For the purposes of this litigation, however, the court focused on the Salzburg, Hines Road, and Pine River sites in order to determine the applicability of the CWA as to all the sites. *Id.* at 632-33.

117. *Id.* at 632.

118. *Rapanos*, 126 S. Ct. at 2214. The wetlands that existed at the Salzburg site "connected to a man-made drain, which drain[ed] into Hoppler Creek, which flow[ed] into the Kawkawlin River, which emptie[d] into Saginaw Bay and Lake Huron." *Id.* at 2219.

119. *Rapanos*, 376 F.3d at 632.

120. *Id.* Under the CWA,

> Any discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced, shall be required to have a permit.

33 U.S.C. § 1344(f)(2) (2000). The Secretary of the Army "may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material in the navigable waters at specified disposal sites." *Id.* § 1344(a).

121. *Rapanos*, 376 F.3d at 632.

122. *Id.*

123. *Id.*

124. *Id.*

vegetation."[125] As a result, the property looked "'like nothing more than a beach.'"[126]

In response to the illegal filling of the Salzburg site, the EPA issued an administrative compliance order, demanding that Rapanos cease the filling activities at the site.[127] Despite the order, Rapanos continued development, and in response the EPA referred the matter to the Department of Justice.[128] Criminal and civil charges were filed against Rapanos, and he was indicted on two counts relating to the violation of the CWA.[129] The district court eventually convicted Rapanos and the Sixth Circuit affirmed.[130]

A. Raging Rivers and Trickling Streams: The Plurality's Permanence Requirement

The Supreme Court granted certiorari in *Rapanos* to address the issue of "whether a wetland may be considered 'adjacent to' remote 'waters of the United States,' because of a mere hydrological connection to them."[131] The plurality of the Court began its analysis of the wetland issue by considering the degree of permanence that a waterway must exhibit in order to be subject to federal regulation.[132] The Court first focused on the language of the CWA's definition of "navigable waters."[133] Given the plain language of the statute, the Court held that "'the waters of the United States' include only relatively permanent, standing or flowing bodies of water."[134] The Court reasoned that the use of the phrase "the waters of the United States" as opposed to "water of the United

125. *Id.*
126. *Id.* (quotation marks omitted).
127. *Id.* at 633.
128. *Id.*
129. *Id.* (citing United States v. Rapanos, 895 F. Supp. 165, 166 (E.D. Mich. 1995)).
130. *Id.* at 632. The Sixth Circuit reasoned that Rapanos was subject to the CWA because "[t]here is no 'direct abutment' requirement in order to invoke CWA jurisdiction. Non-navigable waters must have a hydrological connection or some other 'significant nexus' to traditional navigable waters in order to invoke CWA jurisdiction." *Id.* at 642. The court concluded that "the record demonstrates that there were hydrological connections between all three sites and corresponding adjacent tributaries of navigable waters." *Id.* at 643.
131. Rapanos v. United States, 126 S. Ct. 2208, 2225 (2006) (plurality opinion).
132. *Id.* at 2220-25.
133. *Id.* at 2220. Upon considering the CWA's definition of "navigable waters" as "waters of the United States," Justice Scalia argued for the plurality of the Court that:

> [t]he only natural definition of the term 'waters,' [the Court's] prior and subsequent judicial constructions of it, clear evidence from other provisions of the statute, and [the] Court's canons of construction all confirm that 'the waters of the United States' in § 1362(7) cannot bear the expansive meaning that the Corps would give it.

Id.
134. *Id.* at 2221.

States" indicated that the CWA did not refer to all water in general.[135] Rather, the definition was meant to include a narrower class of water, as commonly understood to mean "geographical features such as oceans, rivers, [and] lakes."[136] Such terms refer to "continuously present, fixed bodies of water, as opposed to ordinarily dry channels through which water occasionally or intermittently flows," such as the wetlands and ditches on Rapanos' property.[137]

B. Re-defining the Boundary of Wetland Regulation: The Plurality's Surface Connection Requirement

The Court continued its wetland analysis by addressing the issue of "whether a wetland may be considered 'adjacent to' remote 'waters of the United States,' because of a mere hydrologic connection to them."[138] Based upon its decisions in *Riverside* and *SWANCC*, the Court held that "*only* those wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters' and wetlands, are 'adjacent to' such waters and covered by the [CWA]."[139] The Court reasoned that its holding in *Riverside* relied upon the indiscernible boundary between the wetlands and the water.[140] In other words, it was the "significant nexus" be-

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135. *Id.* at 2220.

136. *Id.* (quoting WEBSTER'S NEW INTERNATIONAL DICTIONARY 2882 (2d ed. 1954)).

137. *Id.* at 2221. The Court further reasoned that in addition to its use of the phrase "the waters of the United States," other language in the CWA indicates that Congress intended to treat temporary bodies of water differently from "relatively permanent bodies of water." *Id.* at 2222. For example, the CWA "categorizes the channels and conduits that typically carry intermittent flows of water separately from 'navigable waters,' by including them in the definition of 'point source.'" *Id.* The CWA defines "point source" as "any discernable, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C. § 1362(14) (2000). Furthermore, the CWA distinguishes between "point source" and "navigable waters" in its definition of "discharge of a pollutant." *Rapanos*, 126 S. Ct. at 2222-23. Given this distinction, the Court argued that the CWA was intended to classify temporary bodies of water separately from navigable bodies of water. *Id.* Thus, temporary bodies of water are not "waters of the United States"; they are outside of the CWA's jurisdiction. *Id.*

138. *Rapanos*, 126 S. Ct. at 2225.

139. *Id.* at 2226.

140. *Id.* (citing United States v. Riverside Bayview Homes, 474 U.S. 121, 134 (1985)). The Court in *Riverside* noted that:

> In view of the breadth of federal regulatory authority contemplated by the Act itself and *the inherent difficulties of defining precise bounds to regulable waters*, the Corps' ecological judgment about the relationship between waters and their adjacent wetlands provides an adequate basis for a legal judgment that adjacent wetlands may be defined as waters under the [CWA].

Riverside, 474 U.S. at 134 (emphasis added).

tween the two that was the basis for holding that wetlands adjacent to navigable waters fall within the scope of the CWA.[141]

C. The Failure of the Permanence Requirement

Despite the plurality's attempt to resolve the issue through an interpretation of the CWA's plain language and the Court's prior cases, its conclusion falls short of a true resolution. The Court's reasoning fails to reconcile its holding with both the prior law and the environmental concerns underlying the CWA. As Justice Kennedy argued in his concurrence, the plurality's requirement that water be permanent or continuously flowing "makes little practical sense in a statute concerned with downstream water quality. The merest trickle, if continuous, would count as a 'water' subject to federal regulation, while torrents thundering at irregular intervals through otherwise dry channels would not."[142] Justice Stevens, writing for the dissent, reiterated this concern and argued that the plurality's permanence requirement ignores the effects of even temporary or periodic waterways on the environment.[143]

Because the goal of the CWA was to restore and protect the quality of the nation's waters,[144] Congress could not have intended for waters that

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141. *Rapanos*, 126 S. Ct at 2226. Therefore, the plurality argued that in order for the wetlands in *Rapanos* to be covered by the CWA, two conditions had to be present: first, the channel adjacent to the wetlands had to contain "wate[r] of the United States," defined as "a relatively permanent body of water connected to traditional interstate navigable waters"; and second, the wetlands had to have a "continuous surface connection" with those waters, meaning that it would be "difficult to determine where the 'water' end[ed] and the 'wetland' beg[an]." *Id.* at 2227. For a determination as to whether these two conditions were met, the Court remanded the case to the lower courts to reexamine the facts in light of its holding. *Id.* at 2235.

142. *Id.* at 2242 (Kennedy, J., concurring). Justice Kennedy noted that the Los Angeles River normally consists of "only a trickle of water," with the river "often look[ing] more like a dry roadway than a river." *Id.* With heavy rains, however, the river can carry a "powerful and destructive" current. *Id.*

143. *Id.* at 2259-60 (Stevens, J., dissenting). The dissent argued that under the plurality's reasoning,

> the Corps can regulate polluters who dump dredge into a stream that flows year round but may not be able to regulate polluters who dump into a neighboring stream that flows for only 290 days of the year even if the dredge in this second stream would have the same effect on downstream waters as the dredge in the year-round one.

Id. at 2260. The dissent also criticized the plurality's reliance on the dictionary definition of terms such as "streams" in order to deduce that "waters of the United States," which includes streams, must be permanent. *Id.* The dissent noted that "common sense and common usage demonstrate that intermittent streams, like perennial streams, are still streams." *Id.* Finally, the dissent criticized the plurality's argument that the CWA's definition of "point source" reflects Congress' intent that only permanent bodies of water are to be regulated. *Id.* at 2260-61. The definition of "point source" is not relevant to the issue of permanence because sources such as pipes, channels, or conduits "can all hold water permanently as well as intermittently." *Id.*

144. 33 U.S.C. § 1251(a) (2000).

so significantly impact the environment to fall outside the scope of the CWA simply because their flow is not continuous.[145] The legislative history of the CWA and its amendments reveal that Congress did not intend to restrict the CWA's scope in this way.[146] If Congress' intention was to impose such a restriction, "Congress could [have] draw[n] a line to exclude irregular waterways, but nothing in the statute suggests it has done so."[147]

Regardless of whether a particular waterway flows continuously or only occasionally, the plurality fails to consider the possible impact that polluted temporary waterways can have upon navigable waterways.[148] To accomplish the goal of the CWA, its provisions must be liberally interpreted so as to include any bodies of water that negatively affect the na-

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145. *See Rapanos*, 126 S. Ct. at 2242 (Kennedy, J., concurring); Quivira Mining Co. v. U.S. Envtl. Prot. Agency, 765 F.2d 126, 130 (10th Cir. 1985) (holding that two non-navigable waterways were within the scope of the CWA because they formed a surface connection with navigable waters during heavy rainfall and flowed regularly into navigable waterways through underground acquifers); United States v. Phelps Dodge Corp., 391 F. Supp. 1181, 1187 (D. Ariz. 1975). In *Phelps*, the court explained that in order for the CWA to be effective and its goals to be achieved, its scope must extend to all pollutants discharged into the nation's waterways. *Id.* Thus, "waters of the United States" must include "*any waterway within the United States* also including normally dry arroyos through which water *may flow*, where such water will ultimately end up in public waters . . . either within or adjacent to the United States." *Id.* (emphasis added); *see also The Supreme Court, 2005 Term—Leading Cases*, 120 HARV. L. REV. 351, 359-60 (2006) (arguing that the plurality's permanence requirement not only fails to recognize the ecological significance of temporary or periodic waterways, but also the fact that "the environmental salience of these bodies is likely to increase over time as global warming produces more flooding, extreme weather patterns, and fluctuations in water levels, thereby increasing both the number and the size of temporary waters").

146. *See Rapanos*, 126 S. Ct. at 2260 n.11 (Stevens, J., dissenting) (noting that during the 1977 debate regarding a proposed restriction of federal jurisdiction under the CWA, Senator Bentsen acknowledged the Act encompassed "small streams, ponds, isolated marshes, and *intermittently flowing gullies*" (emphasis added)); 118 CONG. REC. 33747, 33756-57 (1972) (statement of Rep. Dingell) (stating that the term "navigable waters" in the CWA "means all 'the waters of the United States' in a geographical sense" rather than "in the technical sense as [is] sometimes see[n] in some laws").

147. *Rapanos*, 126 S. Ct. at 2242 (Kennedy, J., concurring).

148. *See Phelps*, 391 F. Supp. at 1187. The court in *Phelps* argued that any tributaries of "navigable waters," whether permanent or not, should be within the scope of the CWA. *Id.* Otherwise, the tributaries of "navigable waters" could be "used as open sewers" and the "navigable waters" would "become . . . mere conduit[s] for upstream waste." *Id.* Such a result would have a significant, negative impact upon interstate commerce. *Id. See also The Supreme Court, 2005 Term—Leading Cases*, *supra* note 145, at 360-61. The plurality's permanence requirement ignores the uncertainty that is inherent in environmental science and policy. *Id.* at 360. Although current scientific data may indicate that pollution of temporary or occasionally flowing waterways does not significantly affect navigable waters, future studies may present different results. *Id.* Thus, the plurality's inflexible permanence standard is inconsistent with the nature of environmental science and erects a barrier to future policy changes. *Id.*

tion's interstate waters.[149] Such a construction is supported not only by the broad reach of the CWA, but also by the difficulty in determining the extent to which one polluted body of water may negatively impact another.[150] Pollutants carried by intermittent streams of water can have the same harmful effects as pollutants carried by more permanent streams. Thus, intermittent streams deserve the same level of protection as any other body of water.[151]

Congress has historically established broad jurisdiction over navigable waters based upon its commerce power. It follows that Congress must have intended the CWA to provide the same broad federal jurisdiction over those intermittent waters that may adversely affect the nation's navigable waters.[152] Environmental policy and the CWA's legal foundation in the commerce power suggest that Congress should explicitly include temporary or non-continuous waterways in the CWA's definition of "navigable waters."[153] The concurrence and dissent in *Rapanos* are

149. *See Rapanos*, 126 S. Ct. at 2260 (Stevens, J., dissenting); *Quivira*, 765 F.2d at 129. The CWA was intended to include as much of the waters of the United States as possible, rather than just some. *Quivira*, 765 F.2d at 129 (citing Deltona Corp. v. United States, 657 F.2d 1184, 1186 (1981); United States v. Earth Sciences, Inc., 599 F.2d 368, 373 (10th Cir. 1979)). The Tenth Circuit in *Earth Sciences* highlights that "[b]eginning with the Congressional intent to eliminate pollution from the nation's waters by 1985, the [CWA] was designed to regulate to the fullest extent possible those sources emitting pollution into rivers, streams and lakes." *Earth Sciences*, 599 F.2d at 373.

150. *See* Kimberly Breedon, Casenote, *The Reach of* Raich*: Implications for Legislative Amendments and Judicial Interpretations of the Clean Water Act*, 74 U. CIN. L. REV. 1441, 1474 (2006) ("Science suggests that if the Court allows regulation of any water that is not navigable-in-fact, such as tributaries which are adjacent to navigable waters, then it should permit regulation of all waters, including 'isolated' wetlands. Any limits drawn more narrowly would be arbitrary, as water connections constitute a continuum in the hydrologic cycle.").

151. *See* United States v. Eidson, 108 F.3d 1336, 1342 (11th Cir. 1997) ("[T]here is no reason to suspect that Congress intended to exclude from 'waters of the United States' tributaries that flow only intermittently. Pollutants need not reach interstate bodies of water immediately or continuously in order to inflict serious environmental damage.").

152. *See* United States v. Deaton, 332 F.3d 698, 711 (4th Cir. 2003). The Corps' jurisdiction "extends to any branch of a tributary system that eventually flows into a navigable body of water." *Id.* This interpretation of the Corps' jurisdiction is permissible because it "does not invoke the outer limits of Congress's power or alter the federal-state framework." *Id.* at 708. Whether a particular waterway is within the scope of the CWA does not depend upon whether it is continuously discharging water into a navigable waterway. United States v. Tex. Pipe Line Co., 611 F.2d 345, 347 (10th Cir. 1979). Instead, "as long as the tributary would flow into the navigable body of water 'during significant rainfall,' it is capable of spreading environmental damage" and subject to CWA regulation. *Eidson*, 108 F.3d at 1342. As the Tenth Circuit has stated, "[i]t seems clear Congress intended to regulate discharges made into every creek, stream, river or body of water that in any way may affect interstate commerce." *Earth Sciences*, 599 F.2d at 375.

153. *See* Leslie Salt Co. v. United States, 896 F.2d 354, 357 (9th Cir. 1990). The court in *Leslie* asserted that Congress intended to broadly apply the CWA to any water within the scope of the commerce power. *Id.* In addition, "Congress intended to regulate local

correct to argue that the plurality's definition of "waters of the United States" is too narrow.

D. Further Confusion for the Judiciary: The Plurality's Departure from Riverside *and* SWANCC

The significance of the plurality's opinion is further weakened by its adoption of a new standard for determining whether a wetland is adjacent to a navigable waterway. Justice Kennedy argued in his concurrence that the "continuous surface connection" requirement that the plurality adopted[154] was inconsistent with the plain language of the CWA, the "significant nexus" requirement adopted in *Riverside* and *SWANCC*,[155] and the Court's commerce power jurisprudence.[156] Noting the importance of

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aquatic ecosystems regardless of their origin." *Id.* at 358; *see also* Martin S. Lessner, Casenote, Leslie Salt Co. v. United States*: Keep the Birds Out of Your Birdbath: It May Be Considered the Jurisdiction of the Army Corps of Engineers as a "Water of the United States,"* 2 VILL. ENVTL. L.J. 463, 474 (1991) (stating that the clear intent of Congress is that "water pollution that moves in hydrologic cycles must be controlled at the source").

154. *Rapanos*, 126 S. Ct. at 2226.

155. Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs (*SWANCC*), 531 U.S. 159, 167-68 (2001).

156. *See Rapanos*, 126 S. Ct. at 2244-47 (Kennedy, J., concurring). Justice Kennedy argued that the plurality's reasoning is "inconsistent with the [CWA's] text, structure, and purpose." *Id.* at 2246. The CWA prohibits "the discharge of pollutants into navigable waters," and pollutants are defined to include fill materials such as rock and sand. *Id.* at 2245. Fill material may be treated as a toxic pollutant because it destroys the ability of a wetland to filter and purify water and to regulate the flow of pollutants into nearby navigable waters. *Id.* In other words, when a wetland is drained and filled, "dirty water [will] no longer be stored and filtered . . . [and] the act of filling and draining itself may cause the release of nutrients, toxins, and pathogens that were trapped, neutralized, and perhaps amenable to filtering or detoxification in the wetlands." *Id.* This concern equally applies to wetlands adjacent to, but physically separated from navigable waters. *Id.* The filling of such wetlands will allow pollutants "stored or contained in the wetlands" to flow into the adjacent waterway. *Id.* Thus, the Corps' adjacency standard is supported by the structure of the CWA while the "continuous surface connection" standard is not. *Id.* at 2245-46.

Justice Kennedy also argues that the "continuous surface connection" requirement is inconsistent with the Court's decisions in *Riverside* and *SWANCC*. *Id.* at 2244. The plurality never directly addresses the "significant nexus" requirement adopted in these decisions. *Id.* at 2241. In *Riverside*, the Court recognized that wetlands significantly affect water quality and the aquatic ecosystem; the Court did not consider it relevant whether "'the moisture creating the wetlands . . . [found] its source in the adjacent bodies of water.'" *Id.* at 2247 (quoting United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 135 (1985)). In *SWANCC*, the Court rejected CWA jurisdiction over non-navigable, isolated, intrastate waters. *Id.* This holding did not overrule the holding in *Riverside* that adjacency to navigable waters is a factor to be considered in determining CWA jurisdiction. *Id.* at 2244-45. Rather, the Court in *SWANCC* distinguished adjacent, non-navigable waters and recognized the adjacency standard as reasonable. *Id.* at 2245.

Finally, Justice Kennedy asserted that the plurality's decision is inconsistent with the Court's prior commerce power jurisprudence. *Id.* at 2246. As a result of the plurality's new requirement, when a "continuous surface connection" is absent, jurisdiction is foreclosed over wetlands that are adjacent to navigable waters, even though such navigable

wetlands and their vital relationship with navigable waters, Justice Kennedy proposed that "wetlands possess the requisite nexus . . . if [they] either alone or in combination with similarly situated lands in the region significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'"[157] Thus, Justice Kennedy argued that the "significant nexus" test provides a better standard by which to determine CWA jurisdiction over wetlands.[158]

The dissent in *Rapanos* also criticized the plurality's "continuous surface connection" test by arguing that wetlands, just like temporary or intermittent waterways, significantly impact the environment.[159] This impact occurs regardless of whether the wetland is continuously connected to navigable waterways.[160] Although wetlands that are physically separated from navigable waters "may perform less valuable functions, this is a matter for the Corps to evaluate in its permitting decisions."[161] Therefore, the plurality's "continuous surface connection" requirement is an arbitrary "statutory invention."[162]

The text of the CWA establishes that wetlands adjacent to navigable waterways fall within its scope.[163] Because Congress intended jurisdiction

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waters were traditionally within the scope of the commerce power. *Id.* However, when a "continuous surface connection" exists between a wetland, however remote, and navigable waters, the plurality permits applications of the CWA "as far from traditional federal authority as are the waters it deems beyond the statute's reach." *Id.*

157. *Id.* at 2248.

158. *Id.* at 2252. Justice Kennedy would have remanded to determine whether the wetlands on Rapanos's property have a significant nexus with navigable waters. *Id.*

159. *Id.* at 2257 (Stevens, J., dissenting). Wetlands are crucial "in maintaining the quality of their adjacent waters, . . . and consequently in the waters downstream." *Id.* (citation omitted). Thus, wetlands are "integral to the 'chemical, physical, and biological integrity of the Nation's waters.'" *Id.* (quoting 33 U.S.C. § 1251(a) (2000)).

160. *Id.* at 2262-63. The Court in *Riverside* explained that "the Corps has concluded that wetlands adjacent to lakes, rivers, streams, and other bodies of water may function as integral parts of the aquatic environment *even when the moisture creating the wetlands does not find its source in the adjacent bodies of water.*" *Riverside*, 474 U.S. at 135 (emphasis added). The Court went on to hold that the Corps judgment was reasonable and that "a definition of 'waters of the United States' encompassing all wetlands adjacent to other bodies of water over which the Corps has jurisdiction is a permissible interpretation of the [CWA]." *Id.*

161. *Rapanos*, 126 S. Ct. at 2263 (Stevens, J., dissenting).

162. *Id.* at 2262.

163. 33 U.S.C. § 1344(g)(1) (2000). The CWA allows individual states to administer their own programs by which they can grant permits for the discharge of dredged or fill material. *Id.* The CWA provides that:

> [t]he Governor of any State desiring to administer its own individual and general permit program for the discharge of dredged or fill material into the navigable waters (other than those waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce . . . , including all waters which are subject to the ebb and flow of the tide . . . *including wetlands adjacent thereto*) within its jurisdiction may submit to

under the CWA to be broad, and because wetlands perform important environmental functions,[164] fulfillment of the CWA's underlying values demands defining "adjacency" using the "significant nexus" test.[165] Also, although some changes in wetlands may only have a minor impact on the surrounding environment, "the cumulative effect of numerous piecemeal changes can result in a major impairment of wetland resources."[166] Thus, despite the seemingly subjective nature of Justice Kennedy's "significant nexus" test for adjacency,[167] Congress should adopt his test because it is

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the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact.

Id. (emphasis added). In *Riverside*, the Court determined that the Corps reasonably interpreted the CWA to include wetlands adjacent to "waters of the United States." *Riverside*, 474 U.S. at 139.

164. *See Rapanos*, 126 S. Ct. at 2257 (Stevens, J., dissenting) (citing 33 C.F.R. § 320.4(b)(2) (2006)). Wetlands perform a variety of functions, including food chain production; natural drainage; salinity distribution; protection of other lands from waves, erosion, and storms; storage of excess waters; and water purification. 33 C.F.R. § 320.4(b)(2). The plurality in *Rapanos* fails to recognize that "wetlands are crucial if the environment is to function properly." Robert J. Aalberts, From the Editor-in-Chief, *The Fate of Wetlands After* Rapanos/Carabell*: Fortuituous or Folly?*, 35 REAL EST. L.J. 218 (2006). For example, the plurality "ignores the importance of wetlands for flood protection, protecting aquatic life, and safeguarding the nation's water quality." *Id.* at 221. Wetlands play a crucial role in the proper functioning of a watershed "by storing, then releasing, precipitation and surface water into other surface resources, groundwater, and the atmosphere." Breedon, *supra* note 150, at 1467. In addition, "[m]any kinds of interactions occur between groundwater and the surface water of wetlands. Sometimes wetlands receive major discharge points for flowing groundwater. Conversely, wetlands may serve as major sources of recharge, feeding water into the surrounding groundwater system." *Id.* at 1468 (footnotes omitted). Thus, pollution and drainage into wetlands can have serious adverse effects upon the environment and can "potentially chang[e] the hydrology of an entire watershed." *Id.* at 1468-69.

165. *See Rapanos*, 126 S. Ct. at 2245-46 (Kennedy, J., concurring). The "significant nexus" test enables the federal government to effectively pursue the CWA's underlying goals by allowing the courts and environmental regulators to adapt the scope of federal jurisdiction under the CWA to future climate change "by looking not at a body of water's static characteristics but at its living connection with other waters." *The Supreme Court, 2005 Term—Leading Cases*, *supra* note 145, at 360. In other words, the flexibility of the "significant nexus" test allows for future adjustment of the nexus in light of evolving scientific knowledge. *Id.* Additionally, the "significant nexus" test is more consistent with the CWA's commerce power roots. *Id.* at 358. The test effectively "keeps the Rehnquist Revolution alive, dovetailing nicely with the Court's recent Commerce Clause jurisprudence—specifically, the recognition of federal authority to regulate classes of activities that substantially affect interstate commerce." *Id.*

166. 33 C.F.R. § 320.4(b)(3) (2006).

167. *See The Supreme Court, 2005 Term—Leading Cases*, *supra* note 145, at 361. Despite the uncertainty that the "significant nexus" test may create, it will create no more uncertainty than may be caused by the plurality's solution. *See id.* Because the "continuous surface connection" requirement restricts the scope of the CWA, it will "create regulatory space for state and local governments, some of which [may] create new legislation to fill the void, others of which [may] not. The resulting patchwork of varying standards [may] burden economic actors who operate across state lines." *Id.*

more consistent with the CWA's overall intent and the environmental concerns it was meant to address.[168]

E. The Plurality's Failure to Defer: The "Controlling Weight" of Agency Interpretations

Finally, the plurality's opinion fails to acknowledge that deference must be given to administrative agency decisions.[169] In *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, the Court held that when Congress delegates to an agency the authority to interpret ambiguous provisions of a statute, the agency's interpretations "are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute."[170] If Congress has not explicitly resolved a statutory ambiguity, then courts must determine whether an agency's interpretation of the ambiguity is reasonable in light of the statute's purpose and construction.[171] Consistently with this test, the plurality acknowledged that Congress has not directly addressed the issue at hand.[172] However, the plurality argued that the permanence requirement and the "continuous surface connection" test are more consistent with the CWA's language and structure than the Corps' interpretation.[173]

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168. *See* S. REP. NO. 92-414, at 11 (1971), *as reprinted in* 1972 U.S.C.C.A.N. 3668, 3678. Justice Kennedy's test is more consistent with the overall objective of the CWA "to restore and maintain the natural chemical, physical, and biological integrity of the Nation's waters." *Id.* The 1972 amendments were passed as a remedy to failures of the existing national effort to control water pollution. *Id.* at 7, *as reprinted in* 1972 U.S.C.C.A.N. at 3674. Commenting on the severely polluted state of the nation's navigable waters, the Senate Committee on Public Works found that "[r]ivers [were] the primary sources of pollution of coastal waters and the oceans, . . . many lakes and confined waterways [were] aging rapidly under the impact of increased pollution[, and r]ivers, lakes, and streams [were] being used to dispose of man's wastes rather than to support man's life and health." *Id.*

169. *Rapanos*, 126 S. Ct. at 2265 (Stevens, J., dissenting).

170. Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 844 (1984).

171. *Id.* at 842-43. In *Chevron*, the Court set out a two part test courts must apply to determine whether an agency's interpretation of a statutory ambiguity is permissible. *Id.* First, the court must consider "whether Congress has directly spoken to the precise question at issue." *Id.* at 842. If Congress has addressed the statutory issue and Congress' intent is clear, then both the court and the agency must defer to Congress' interpretation. *Id.* at 842-43. If Congress has not addressed the precise issue, however, then the court moves to step two of the analysis, wherein the court must determine "whether the agency's answer [to the issue] is based on a permissible construction of the statute." *Id.* at 843.

172. *Rapanos*, 126 S. Ct. at 2231 (plurality opinion). The plurality states that Congress has failed to express any opinion as to whether an adjacent wetland is covered by the CWA. *Id.*

173. *Id.* at 2225-27. The Court first noted that the Corps did have some discretion to determine what constitutes an adjacent wetland based on certain ecological factors. *Id.* at 2225-26. The Court went on to say, however, that the Corps could not exercise its ecological discretion in cases where a wetland did not share a continuous surface connection with a permanent body of water. *Id.* at 2226. The Court stated that this narrowing of the

In his dissent, Justice Stevens noted that the Corps determined that wetlands adjacent to tributaries of navigable waters play an essential role in maintaining the quality of the nation's waters.[174] Accordingly, the Court should have deferred to the Corps' interpretation of the CWA, as it applies to specific wetlands, because it would have reinforced the CWA's purpose to broadly protect the nation's waters.[175] Such deference would be consistent with the Court's *Chevron* jurisprudence.[176]

The difficulty and complexity of determining the effects of polluted wetlands on navigable waters also suggests that the Corps and the EPA should be given deference on such matters.[177] Such deference would allow for efficient regulation of the nation's waters and would enable the government to apply its guidelines on a case-by-case basis.[178]

III. CONCLUSION

The Court's definition of the scope of government jurisdiction over water has come a long way since *The Daniel Ball*. Since then, federal regulation of the nation's waters has dramatically expanded. Although the basis of federal jurisdiction over water remains grounded in Congress' commerce power, the Court has yet to define the outer boundary of this

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Corps' discretion was consistent with the CWA, which provided separately for unconnected "point sources" to navigable waters. *Id.* at 2227.

174. *Id.* at 2252 (Stevens, J., dissenting) ("[W]etlands adjacent to tributaries of traditionally navigable waters . . . provid[e] habitat for aquatic animals, keep[] excessive sediment and toxic pollutants out of adjacent waters, and reduc[e] downstream flooding by absorbing water . . . .").

175. *Id.* at 2252-53. The Corps' "decision to treat . . . wetlands as encompassed within the term 'waters of the United States' is a quintessential example of the Executive's reasonable interpretation of a statutory provision." *Id.*

176. *Id.* at 2255. For example, in *Riverside*, the Court held that in view of *Chevron*, its review was "limited to the question whether it [was] reasonable, in light of the language, policies, and legislative history of the [CWA] for the Corps to exercise jurisdiction over wetlands adjacent to but not regularly flooded by rivers, streams, and other hydrographic features more conventionally identifiable as 'waters.'" United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 131 (1985). Furthermore, although the Corps' statutory interpretation may include wetlands that do not play a significant role in the local ecosystem, this does not preclude *Chevron* deference. *Id.* at 135 n.9. If it is determined that a wetland lacks sufficient importance, then "the Corps may always allow development of the wetland . . . by issuing a permit." *Id.*

177. *See* Breedon, *supra* note 150, at 1472-73. It is a "highly complex, scientific undertaking" to determine the "effects [on 'navigable waters'] of discharging groundwater pollutants in[to] wetlands." *Id.* at 1472. Thus, "[g]iven the complex interactions between wetlands characteristics, groundwater flow, and the properties of pollutants, the regulatory agencies entrusted to administer [the CWA] are best suited to determine whether issuance of a dredge and fill permit serves a statutory policy." *Id.* at 1473. Therefore, Congress "correctly delegated broad regulatory authority to the EPA and the Corps." *Id.*

178. *See Rapanos*, 126 S. Ct. at 2256 (Stevens, J., dissenting) (citing *Riverside*, 474 U.S. at 135 n.9).

jurisdiction.[179] Despite the Court's attempt in *Rapanos* to mark a clearer boundary, however, the plurality's opinion failed to provide an effective solution and raised a host of new problems. As a result, the ambiguities of the CWA remain unresolved and will likely require the Court or Congress to revisit and revise the scope of federal water regulation.

179. *Compare* The Daniel Ball, 77 U.S. (10 Wall.) 557, 563 (1870) (holding that federal jurisdiction over water depends on a waterway's navigability, which is determined by whether it is used or has the potential to be used in its present condition as a highway for interstate commerce), *and* United States v. Appalachian Elec. Power Co., 311 U.S. 377, 409 (1940) (holding that a waterway's navigability depends on the waterway's current or potential use for interstate commerce), *with Riverside*, 474 U.S. at 135 (holding that non-navigable wetlands adjacent to navigable waterways are properly within the federal government's control) *and* Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs (*SWANCC*), 531 U.S. 159, 167 (2000) (holding that "it was the 'significant nexus' between the [non-navigable] wetlands and the navigable waterways that informed" the Court's holding in *Riverside*).